86-1226

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN MORRELL & CO.,

Petitioner,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO AND CLC; and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Dated: January 26, 1987

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QUESTION PRESENTED

Should this Court overrule *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976), because experience has demonstrated that it deprives employers of the protection intended by express no-strike clauses in collective bargaining agreements and thereby undermines the federal policies favoring enforceability of such agreements and arbitration of labor disputes?

PARTIES TO THE PROCEEDING

In addition to those parties named in this Petition, the following officers of the respondent labor organizations were defendants below:

Dennis Foster
James R. Lyons
John Doe and Other Persons Unknown

Pursuant to Rule 28.1 of the Supreme Court Rules, John Morrell & Co. states that it is a wholly owned subsidiary of United Brands Company.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

John Morrell & Co. ("Morrell") hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 804 F.2d 457 (8th Cir. 1986) and is reprinted at A-1 of the Appendix. The opinion of the United States District Court for the District of South Dakota granting Morrell's motion for a preliminary injunction is reported at 641 F. Supp. 803 (D.S.D. 1986) and is reprinted at A-11 of the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on October 30, 1986. (A-1) This Petition is being filed on January 26, 1987.

STATUTORY PROVISIONS INVOLVED

This case involves section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, and section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185. Section 4 of the Norris-LaGuardia Act provides in pertinent part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person ... from ...
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

Section 301(a) of the Labor Management Relations Act provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioner Morrell is a corporation engaged in meat processing and packing. Its plant in Sioux Falls, South Dakota is one of the nation's largest single meat packing

facilities and employs approximately 3000 workers, making Morrell the largest private employer in the state. Morrell hourly workers are represented by respondent labor unions, Local 304A of the United Food and Commercial Workers Union ("Local 304A") and the UFCW International Union, AFL-CIO and CLC (the "International"). Morrell and the unions are parties to a collective bargaining agreement covering the Sioux Falls plant dated November 20, 1985 (the "Agreement"). Morrell also has a plant located in Arkansas City, Kansas, whose workers are covered by a different collective bargaining agreement. Arkansas City workers are represented by the International and UFCW Local 340, another local bargaining unit.

On July 1, 1986, the collective bargaining agreement covering Local 340 workers at the Arkansas City facility expired, and Local 340 officials called a strike. About one month later, while the Arkansas City strike continued, Local 304A officers held a general membership meeting of the Sioux Falls workers. (Tr. 5)[1] A few hours after the meeting, early on August 4, 1986, members of Sioux Falls Local 304A struck the Sioux Falls plant when pickets from Arkansas City Local 340 appeared. (Tr. 15)

Morrell immediately filed suit in South Dakota state court seeking a temporary restraining order and damages. Morrell claimed that the strike was in violation of the Agreement's no-strike clause, which provides:

> Provisions having been made by this Agreement and local agreements for the peaceful and orderly settlement of any disputes which may arise between

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[1] The following abbreviations are used in this Petition: "Tr." (transcript of the preliminary injunction hearing); "Pl. Ex." (Morrell exhibits at the preliminary injunction hearing); "Def. Ex." (union exhibits).

> Company and the Union or local Unions or any Employee or Employees, it is agreed that during the term of this Agreement there shall be no strike, stoppage, slowdown, or suspension of work on the part of the Union or any local Union or any Union member or lockout on the part of the Company on account of such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the respective agreements. (Def. Ex. A, Art. II, ¶ 5)

Later that day, Local 304A removed the case to the United States District Court for the District of South Dakota pursuant to 28 U.S.C. § 1441(b). After Local 304A made an unconditional offer to return to work, Morrell withdrew its request for a temporary restraining order and permitted the striking workers to return. (Tr. 47-49; Pl. Ex. 9) Full production resumed the following day. Shortly thereafter, on August 8, Local 304A filed a class grievance claiming that Morrell had improperly disciplined workers who took part in the August 4 strike because the Agreement did not bar "sympathy strikes" in support of other unions. (Tr. 30-31; Def. Ex. B)

Despite its earlier unconditional offer to return to work, Local 304A again struck the Sioux Falls plant on August 15 when Local 340 pickets reappeared. (Tr. 21, 49) That morning the district court granted Morrell's request for a temporary restraining order to prevent the irreparable harm that such unannounced and sporadic strikes would cause. On August 29, after considering testimony from seven live witnesses, numerous exhibits, and extensive post-hearing submissions, the court preliminarily enjoined members of Local 304A from engaging in further strikes at Sioux Falls pending arbitration of the parties' dispute. (A-19, 641 F. Supp. at 808) It found that the August 15 strike was "a dispute over an arbitrable issue, *i.e.*, [Morrell's] right under the collective bargain-

ing agreement to discipline [its] workers." (A-16, 641 F. Supp. at 806) The court thus rejected the unions' claim that the strike was merely a sympathy strike and concluded that an injunction was proper under the exception to the Norris-LaGuardia Act recognized in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970) for strikes over arbitrable disputes. (A-17, 641 F. Supp. at 807) In light of the "broad no-strike provision" in the parties' Agreement and Morrell's rejection of union proposals during contract negotiations that would have expressly permitted sympathy strikes, the court also ruled that Morrell was likely to prove that both strikes were barred by the no-strike clause. (A-18-19, 641 F. Supp. at 807) Finally, the court concluded that "customer loss, perishable nature of the product, and loss of suppliers, risks [sic] irreparable harm to the goodwill of the company." (A-18, 641 F. Supp. at 807)

The Eighth Circuit reversed. It did not disturb the district court's finding that the work stoppages were causing Morrell irreparable harm. Instead, it held that Morrell's request for a preliminary injunction was barred by section 4 of the Norris-LaGuardia Act as interpreted by *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976). Finding that the strikes at issue were not over arbitrable disputes but instead were mere sympathy strikes, the appeals court ruled that *Buffalo Forge* was controlling.[2] Accordingly, no injunction could issue, even if the Agreement's no-strike clause barred sympathy strikes.

After the Eighth Circuit's decision, and in light of the unions' prior representations, Morrell requested that the unions agree to expedited arbitration to resolve the proper

[2] Morrell does not seek review of the Eighth Circuit's interim ruling that the strikes at issue were sympathy strikes.

scope of the no-strike clause.[3] The unions refused. Instead, they successfully opposed Morrell's petition to compel arbitration on the ground that only Local 304A was entitled to invoke the Agreement's compulsory arbitration provisions. As a result, there has been no final determination—by either an arbitrator or a court—concerning the scope of the Agreement's no-strike clause. Nor has a trial date been set on Morrell's request for damages resulting from the August strikes. In the meantime, the Eighth Circuit's decision has left Morrell powerless to prevent the unions from engaging in further sympathy strikes at any time.

REASONS FOR GRANTING THE WRIT

This Petition raises a single issue: whether district courts are absolutely barred from preliminarily enjoining a strike that violates a contract's express no-strike clause if the strike is a so-called "sympathy strike" and therefore not prompted by an arbitrable dispute. By a five-to-four vote, this Court ruled in *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 410-13 (1976), that the Norris-LaGuardia Act bars injunctions against sympathy strikes, even if the union had agreed not to strike during the

[3] During the preliminary injunction proceedings the unions had repeatedly insisted that they were prepared to arbitrate whether the parties' Agreement barred the supposed sympathy strikes. For example, at the preliminary injunction hearing Local 304A's president testified that the union was "willing to arbitrate the issue whether its sympathy strike violates the 'no strike' clause of the labor contract." (Tr. 30) Defendants made similar statements in their Answer (Answer ¶ 12 and Aff. Defense) and in their brief to the Eighth Circuit (Brief of Appellants at 14, 26). These claims led the Eighth Circuit to conclude that "Local 304A has sought, not avoided, arbitration of the grievance." (A-7, 804 F.2d at 460)

contract term. Justice Powell has criticized that holding as being based on an "aberrant analysis" that is both "artificial and unprincipled" and inconsistent with settled precedent. *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 730 (1982) (Powell, J., dissenting). Likewise, former Chief Justice Burger has described *Buffalo Forge* as being premised on "mechanical and contradictory analyses." *Id.* at 729. (Burger, C.J., dissenting).

A decade of experience has proven that *Buffalo Forge* undermines the important national labor policies recognized by this Court only six years previously in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970).[4] It creates the intolerable paradox of permitting injunctions against strikes over disputes that are central to the employer-union relationship, but forbidding injunctions where the strike is unrelated to any dispute between the employer and the union. Employers have thus been left without any effective remedy to prevent the

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[4] *Buffalo Forge*'s flawed analysis and its effect of undermining sound national labor policy have been criticized at length in the scholarly literature. *See, e.g.*, Curtin, Buffalo Forge *and the Union's No-Strike Commitment: A Management Perspective*, 1977 Labor Law Developments 57 (V. Cameron ed.); Gould, *On Labor Injunctions Pending Arbitration: Recasting* Buffalo Forge, 30 Stan. L. Rev. 533 (1978); Lowden & Flaherty, *Sympathy Strikes, Arbitration Policy, and the Enforceability of No-Strike Agreements—An Analysis of* Buffalo Forge, 45 Geo. Wash. L. Rev. 633 (1977); Smith, *The Supreme Court,* Boys Markets *Labor Injunctions, and Sympathy Work Stoppages*, 44 U. Chi. L. Rev. 321 (1977); Comment, *Labor Law—Availability of Injunctive Relief To Restrain Sympathy Strikes*, 43 Mo. L. Rev. 503 (1978); Comment, Boys Markets *Injunctive Relief in the Sympathy Strike Context:* Buffalo Forge *From A Management Perspective*, 17 Santa Clara L. Rev. 665 (1977); Note, *Striking A Balance Between The Norris-LaGuardia and The Labor Management Relations Acts: Is It Still Feasible After* Buffalo Forge?, 29 U. Fla. L. Rev. 525 (1977).

irreparable harm that unavoidable and unpredictable work stoppages can cause. Without the right to seek injunctive relief, they are deprived of the benefit of their bargain and, indeed, the union's key contractual promise —industrial peace during the contract term.

The rationale and holding of this Court's prior decisions, particularly *Boys Markets*, cannot support the result reached in *Buffalo Forge*. To the contrary, experience has shown that *Buffalo Forge* has the unintended effect of undermining the strong federal policy favoring specific enforcement of collective bargaining agreements. Furthermore, *Buffalo Forge* has served to frustrate both its stated objectives and the longstanding policy favoring arbitration by undermining the arbitration process itself. Finally, *Buffalo Forge* effectively ousts state courts of jurisdiction over the enforcement of collective bargaining agreements involving sympathy strikes, contrary to the clear Congressional intent in amending the Labor Management Relations Act.

In sum, as Justice Stevens has recognized, a "correct application of the reasoning underlying the landmark decision in *Boys Markets* . . . requires a different result" than this Court reached in *Buffalo Forge*. 428 U.S. at 414 (Stevens, J., dissenting). *Buffalo Forge* should therefore be overruled.

I. *BOYS MARKETS* REQUIRES COURTS TO HARMONIZE THE POLICIES OF THE NORRIS-LAGUARDIA AND THE LABOR MANAGEMENT RELATIONS ACTS.

In *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), this Court held that section 4 of the Norris-LaGuardia Act barred federal courts from enjoining strikes even if they violated no-strike clauses in collective bargaining agreements. Eight years later, however, in

Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970), the Court overruled *Sinclair*, concluding that section 301(a) of the Labor Management Relations Act (the "LMRA") "empowers a federal court to enjoin violations of a contractual duty not to strike." *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 381 (1974). *Boys Markets* held that Norris-LaGuardia's proscription of injunctions was not absolute, but yields to the policies of the LMRA and other important Congressional objectives:

> The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration .... [C]onsideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions.

398 U.S. at 250.

The Court found extensive support for its conclusion in the history of the labor movement, which resulted in the enactment of Norris-LaGuardia nearly a half century ago. The Act's ban on injunctions was designed to aid and protect early union efforts to organize and to engage in collective bargaining. *Boys Markets*, 398 U.S. at 250-51. *See also Jacksonville*, 457 U.S. at 715-16; *Buffalo Forge*, 428 U.S. at 415-16 (Stevens, J., dissenting). Over time, Congressional emphasis shifted "from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Boys Markets*, 398 U.S. at 251. *See also Gateway Coal*, 414 U.S. at 381. One of the products of this shift was the enactment of section 301(a) of the LMRA, which makes collective bargaining agreements specifically enforceable. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 452-54 (1957).

This history led the Court in *Boys Markets* to conclude that the "Norris-LaGuardia Act was responsive to a situation totally different from that which exists today." 398 U.S. at 250. Thus, " 'the reasons behind the Norris-LaGuardia Act seem scarcely applicable to the situation' " in which an injunction is sought against a strike that violates a collective bargaining agreement. *Id.* at 253 n.22, *quoting* Report of Special Atkinson-Sinclair Committee, A.B.A. Labor Relations Law Section—Proceedings 242 (1963) ("Sinclair Report"). Enforcing a no-strike clause does not run afoul of Norris-LaGuardia because " '[w]here an injunction is used against a strike in breach of contract, the union is not subjected in this fashion to judicially created limitations on its freedom of action but is simply compelled to comply with limitations to which it has previously agreed.' " *Id. See also* Lowden & Flaherty, *supra* note 4, 45 Geo. Wash. L. Rev. at 652-56; Smith, *supra* note 4, 44 U. Chi. L. Rev. at 340-42.

In sum, this Court overruled *Sinclair* because it was "a significant departure from [the Court's] otherwise consistent emphasis upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration and [the Court's] efforts to accommodate and harmonize this policy with those underlying the anti-injunction provisions of the Norris-LaGuardia Act." *Boys Markets*, 398 U.S. at 241 (footnotes omitted). Experience has shown that the same is true of *Buffalo Forge*. It too should be overruled.

II. *BUFFALO FORGE* UNDERMINES *BOYS MARKETS*.

Six years after overruling *Sinclair*, the Court in *Buffalo Forge* took a significant step backward by undermining *Boys Markets* and resurrecting many of *Sinclair*'s

shortcomings. In doing so, the Court drew an artificial and analytically empty distinction between strikes over arbitrable disputes, which it held may be enjoined, and sympathy strikes, which it held may not be enjoined. This distinction creates an unwarranted paradox. Under *Boys Markets*, an employer can enjoin a union from striking over issues crucial to its members' terms and conditions of employment because such disputes are generally arbitrable. Under *Buffalo Forge*, however, the employer cannot prevent a union from shutting down a plant in "sympathy" with other unions over issues that are not only unrelated to its members' terms and conditions of employment, but also "may well be contrary to their own best interests," because such strikes are not over arbitrable disputes. Smith, *supra* note 4, 44 U. Chi. L. Rev. at 342. *See also Buffalo Forge*, 428 U.S. at 429 (Stevens, J., dissenting). This result simply makes no sense. It occurred only because this Court in *Buffalo Forge* misapplied the teachings of its earlier decisions.[5]

[5] Indeed, in creating this distinction the Court literally contradicted itself. Section 4 of the Norris-LaGuardia Act bars injunctions only against strikes "involving or growing out of *any labor dispute*." 29 U.S.C. § 104 (emphasis added). Section 13(c) of the Act defines "labor dispute" as "any controversy concerning terms or conditions of employment." *Id.* § 113(c). To reach its conclusion, *Buffalo Forge* contradicted itself by first holding that a sympathy strike is a "labor dispute" involving a "controversy concerning terms or conditions of employment" (and thus within the prohibition of section 4), and then shifting ground to conclude that the same strike is *not* over terms and conditions of employment (and thus not over an arbitrable issue). These opposite conclusions are plainly irreconcilable. *Cf. United States Steel Corp. v. NLRB*, 711 F.2d 772, 779 (7th Cir. 1983) (commenting on the paradox of unions' claim that no-strike clause bars disputes concerning wages, hours and working conditions directly affecting workers but does not preclude strikes over issues not affecting them directly).

In accommodating the Norris-LaGuardia Act to the LMRA, *Boys Markets* articulated several policies that courts should promote:

1. increasing the binding nature and enforceability of collective bargaining agreements. *Boys Markets*, 398 U.S. at 252-53;
2. encouraging parties to submit to arbitration and avoiding judicial interference with the arbitration process. *Id.* at 242-43; and
3. protecting concurrent state court jurisdiction over enforcement of collective bargaining agreements. *Id.* at 243-47.

When these same factors are taken into account here, it is apparent that *Buffalo Forge*, like *Sinclair* before it, "does not further but rather frustrates" national labor policy. *Boys Markets*, 398 U.S. at 241.

A. *Buffalo Forge* Subverts the Enforcement of Collective Bargaining Agreements by Allowing Unions to Avoid Express No-Strike Pledges.

Long before *Boys Markets*, this Court had recognized the need for specific enforcement of collective bargaining agreements as codified in section 301(a) of the LMRA. In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453 (1957), the Court examined the legislative history of section 301(a) and concluded that the statute embodied "a primary concern that unions as well as employees should be bound to collective bargaining contracts." It then expounded on the Congressional objectives underlying the need for enforcement of no-strike promises, quoting at length from the legislative history:

> Congress was also interested in promoting collective bargaining that ended with agreements not to strike. The Senate Report [S. Rep. No. 105, 80th Cong., 1st Sess. (1947)] p. 16 states:
>
> "If unions can break agreements with relative impunity, then such agreements do not tend

> to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace .... Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> "Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce."

353 U.S. at 453-54 (footnote omitted).

The policies of encouraging binding collective bargaining agreements and preventing industrial warfare are unwittingly frustrated by *Buffalo Forge*. No-strike clauses are of crucial importance to an employer because they are designed to prevent mid-term interruptions of the employer's business. *Lincoln Mills*, 353 U.S. at 454. Prohibiting federal courts from enjoining violations of such clauses therefore negates "the principal and most expeditious method by which the no-strike obligation can be enforced." *Boys Markets*, 398 U.S. at 248. Thus, "expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures ... is obviously largely undercut if there is no immediate effective remedy ...." *Id.* at 249. *See also* Gould, *supra* note 4, 30 Stan. L. Rev. at 548-49; Lowden & Flaherty, *supra* note 4, 45 Geo. Wash. L. Rev. at 634.

Damages are a chimerical remedy to the irreparable harm that illegal work stoppages can cause. As the Sinclair Report recognized, "injunctive relief will often be the only effective means by which to remedy the breach of the no-strike pledge and thus effectuate federal labor

policy." Sinclair Report at 242, *quoted in Boys Markets*, 398 U.S. at 249 n.17. Damages are simply "no substitute for an immediate halt to an illegal strike." *Boys Markets*, 398 U.S. at 248. As one commentator has observed, "[t]he practical effect of *Buffalo Forge* is to remove the most effective and least destructive mechanism for enforcing agreements, and to require employers to resort to remedies which may be illusory, insufficient, undesirable, or too harsh." Lowden & Flaherty, *supra* note 4, 45 Geo. Wash. L. Rev. at 653-54.

These considerations apply with even greater force to sympathy strikes. Such strikes are by their very nature unpredictable. Although an employer may be expected to anticipate that a union may strike over alleged violations of the collective bargaining agreement, it has no way of knowing when a sympathy strike will occur. Pickets from another union (or, as here, another local of the same union) can appear at any time without warning. Even after the sympathy strike ends, the pickets may return, again without notice.

To prevent an employer from seeking judicial enforcement of the union's no-strike promise under such circumstances subjects the employer to unannounced, unavoidable strikes and deprives it of the key union commitment in the collective bargaining agreement. Employers are not only bargaining for the right to seek monetary damages at a later time, but for a truly effective remedy that prevents any business interruptions during the contract term. By forbidding injunctions against sympathy strikes, *Buffalo Forge* thus deprives employers of the benefit of their bargain and subverts the goals of section 301 of the LMRA. *See* Gould, *supra* note 4, 30 Stan. L. Rev. at 546 (*Buffalo Forge* "denies employers who bargained for a no-strike clause intended to cover

sympathy strikes the benefits of fully uninterrupted production"); Lowden & Flaherty, *supra* note 4, 45 Geo. Wash. L. Rev. at 635 ("[i]n refusing to give full effect to the no-strike agreement, [*Buffalo Forge*] deprives employers of the benefit of their bargain" and "frustrates the purpose of Section 301" of the LMRA); Smith, *supra* note 4, 44 U. Chi. L. Rev. at 341 ("[r]efusing to enforce collective bargaining agreements was not one of the corrective actions envisioned by Congress [in enacting section 301]").

This case illustrates the problem. Historically, the terms and conditions of employment at all Morrell plants were set forth in a single Master Agreement between Morrell and the International. The Master Agreement had a single expiration date for all plants, leaving Morrell vulnerable to a company-wide strike upon expiration of the Master Agreement's term. To ensure continued production of its perishable meat products in the event of a strike at one of its plants, Morrell has negotiated separate contracts with staggered expiration dates. (Tr. 67-70) To further guard against mid-term work stoppages—particularly sympathy strikes in alleged support of workers who might be striking other Morrell facilities—Morrell continued to insist upon contractual no-strike obligations. Indeed, Morrell categorically rejected the unions' attempt during the most recent collective bargaining negotiations to add a clause expressly permitting sympathy strikes. (Tr. 70-71; Pl. Ex. 11) Likewise, Morrell has bargained for a "struck work" provision which requires Sioux Falls workers to handle work transferred from other striking Morrell facilities. (Def. Ex. A, Art. II, ¶ 6)

By barring an injunction to prevent the supposed sympathy strikes, *Buffalo Forge* has gutted the parties' Agreement. Morrell has lost far more than defendants'

no-strike promise. It also has lost the production continuity intended by staggered contract expiration dates and the Agreement's struck work provision. It has been left powerless to resist the irreparable harm that sporadic, unannounced sympathy strikes can cause. This harm was aptly summarized by the district court, whose conclusions in this regard were not disturbed by the Eighth Circuit:

> Testimony was presented to the court as to both the competitive nature of the meat processing industry and the fungible nature of the industry's product. When orders are unable to be filled, customers in a competitive market are forced to go elsewhere. Often this can result in a permanent loss of this customer, especially when the inability to fill orders is repetitive and sporadic. Suppliers are also affected when the company is unable to accept delivery and keep its commitment as to the number of animals needed. All of these, customer loss, perishable nature of the product, and loss of suppliers, risks [sic] irreparable harm to the goodwill of the Company (A-18, 641 F. Supp. at 807)

In sum, *Buffalo Forge* undermines the policy of promoting the enforceability of collective bargaining agreements and denies employers the only meaningful way of holding unions to their no-strike promise. As one commentator has cogently concluded, "[a]llowing one party to breach the agreement with impunity by denying equitable relief to the other creates a strong disincentive to participate in meaningful collective bargaining." Smith, *supra* note 4, 44 U. Chi. L. Rev. at 340.

B. *Buffalo Forge* Frustrates Its Stated Objective of Encouraging Arbitration.

1. *Buffalo Forge* Marks an Extreme Departure from this Court's Policy Favoring Arbitration of Labor Disputes Over Industrial Warfare.

Ever since the *Steelworkers* trilogy, this Court consistently has emphasized the primacy and sanctity of

arbitration as a substitute for industrial strife in resolving labor-management disputes. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). These policies were reaffirmed by this Court as recently as last Term:

> These precepts have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement. We see no reason either to question their continuing validity, or to eviscerate their meaning by creating an exception to their general applicability.

AT & T Technologies, Inc. v. Communications Workers, 106 S. Ct. 1415, 1418 (1986). A necessary corollary of the preference for arbitration over industrial warfare is that federal courts must be empowered to preserve the peaceful status quo through preliminary injunctions, so that arbitration is truly meaningful. *See Boys Markets*, 398 U.S. at 252-53.

In light of these principles, this Court overruled *Sinclair* because it was "a significant departure from . . . [the Court's] otherwise consistent emphasis upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration." 398 U.S. at 241. These same considerations should compel this Court to overrule *Buffalo Forge*. As even *Buffalo Forge* recognized, a dispute over the validity of a sympathy strike—no less than a grievance over overtime pay or fringe benefits—is an arbitrable issue. 428 U.S. at 405. In both situations the parties have agreed to privately and peacefully resolve disputes over the proper interpretation of their contract. Just as injunctions issue to preserve the parties' agreement to arbitrate grievances, injunctions are necessary to preserve the parties' agreement to arbitrate the validity of a strike itself. There is simply no reason for the

issuance of an injunction to depend on whether the parties' dispute concerns the validity of a strike as opposed to any other term or condition of employment. *Buffalo Forge*, like *Sinclair* before it, frustrates this Court's consistent emphasis upon arbitration as the primary means to effectuate the national policy of peaceful resolution of labor disputes.

2. *Buffalo Forge* Complicates the Courts' Role and Discourages Employers from Agreeing to Arbitration.

A principal assumption underlying *Buffalo Forge* was that preliminary injunctions against sympathy strikes would undermine arbitration by embroiling courts in "hearings, findings, and judicial interpretations of collective-bargaining contracts." 428 U.S. at 412. Experience has demonstrated, however, that *Buffalo Forge* has actually increased judicial intervention into the parties' private dispute resolution procedures and has decreased the effectiveness of the arbitration procedures themselves.

In an effort to come within *Buffalo Forge*, a union can claim, as here, that the strike at issue is not over arbitrable issues. In so doing, the union can prevent the employer from enforcing the union's no-strike pledge, even though, as here, the scope of the no-strike clause may itself be subject to arbitration. An employer is at a distinct disadvantage when faced with such claims, because unions can erect the veil of "sympathy strike" to obscure the real purpose of the strike. Deciding whether a strike is a sympathy strike, as opposed to a strike over an arbitrable dispute, embroils trial courts and courts of appeals in complicated and intricate hearings concerning the nature of industrial disputes and a union's motives in striking.

These difficulties were not readily apparent in *Buffalo Forge* because the parties had agreed that the underlying dispute was not subject to arbitration. *See Buffalo Forge*, 428 U.S. at 407-09. Subsequent lower court cases make clear, however, that the critical question in preliminary injunction proceedings is whether the strike is over an issue not subject to arbitration.[6] These cases confirm that courts must resolve complex questions of contract interpretation to decide the merits of the dispute.[7] *Buffalo Forge* thus burdens the lower courts with the unenviable task of determining the nature and purpose of a strike on an emergency basis, often without the benefit of discovery. The likelihood of error in such situations is high.

This case presents a perfect example. During the preliminary injunction hearing Morrell produced substantial evidence that the August strikes were precipitated by arbitrable grievances, pointing to several union handbills circulated immediately prior to the work stoppages. Those handbills demonstrated Local 304A's belief that its members' own economic self interest was at stake in the battle between Morrell and Local 340. (See, e.g., Pl. Exs. 1, 3, 5,

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[6] *See, e.g., Waller Bros. Stone Co. v. United Steelworkers*, 620 F.2d 132, 136-37 (6th Cir. 1980); *Complete Auto Transit, Inc. v. Reis*, 614 F.2d 1110, 1113-14 (6th Cir. 1980), *aff'd on other grounds*, 451 U.S. 401 (1981); *Design & Mfg. Corp. v. International Union, UAW*, 608 F.2d 767, 769 (7th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980); *Campbell "66" Express, Inc. v. Rundel*, 597 F.2d 125, 128 (8th Cir. 1979); *Cedar Coal Co. v. United Mine Workers*, 560 F.2d 1153, 1171-72 (4th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978); *Local Cartage Ass'n, Inc. v. Highway, City and Air Freight Drivers*, 574 F. Supp. 1573, 1577 (E.D. Mo. 1983).

[7] *See, e.g., Tudor Fashions Ltd. v. Romney*, 634 F. Supp. 297, 301 (S.D.N.Y. 1986); *National Wrecking Co. v. Kumerow*, 606 F. Supp. 374, 376 (N.D. Ill. 1985); *Transcaribbean Motors Transport, Inc. v. Union de Tronquistas*, 553 F. Supp. 362, 364-65 (D.P.R. 1982).

10) Morrell also produced evidence that the August 15 strike followed soon after Local 304A had filed its grievance complaining of Morrell's alleged discipline of striking workers, and was therefore over an arbitrable issue.

The district court engaged in a detailed factual investigation and concluded that the August 15 work stoppage was "a dispute over an arbitrable issue, *i.e.*, the right under the collective bargaining agreement to discipline [Sioux Falls] workers." (A-16, 641 F. Supp. at 806) The Eighth Circuit drew the opposite conclusion from the same evidence and vacated the injunction, usurping the trial court's traditional role as fact finder. That the lower courts reached these sharply divergent conclusions over the hotly contested issue of the nature of the August 15 strike amply demonstrates how *Buffalo Forge* has served to complicate the courts' role.

Buffalo Forge also frustrates the arbitration process itself by discouraging employers from agreeing to binding arbitration. As the Court observed in *Boys Markets*, employers are unlikely to agree to arbitration clauses if the unions' no-strike obligations are not specifically enforced: "[a]ny incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated." 398 U.S. at 248. Employers agree to arbitration because they believe they are getting something in return during the give and take of negotiations. Without the assurance that unions can be compelled to honor their no-strike promise, employers will thus be less likely to agree to binding arbitration in the first place. *Id.* This is true whether or not the strike is technically over an arbitrable issue.[8]

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[8] As Justice Stevens has explained, "in many collective bargaining agreements, the employer has agreed to mandatory arbitration only in exchange for a no-strike clause that extends

(footnote continued on following page)

Finally, because *Buffalo Forge* unconditionally forbids employers from enjoining sympathy strikes, it encourages unions to drag their feet in resolving industrial disputes through arbitration. *See* Curtin, *supra* note 4, 1977 Labor Law Developments at 74. If the union succeeds in convincing a court on a preliminary basis that it has only engaged in a sympathy strike, it may continue to strike, despite its contractual promise not to do so. The union then has a great incentive to delay arbitration over the meaning of the no-strike clause, leaving the employer without any meaningful interim equitable relief and compelling it to continue suffering the damages that such strikes will cause. This result undermines *Buffalo Forge*'s own recognition that, to be effective, arbitration must be prompt. 428 U.S. at 411-12.

Again, this case is illustrative. In opposing Morrell's request for a preliminary injunction, the unions repeatedly represented that they were prepared to begin arbitration immediately to resolve whether the Agreement barred sympathy strikes. After the Eighth Circuit vacated the preliminary injunction, however, the unions—having secured the right to engage in further strikes pending resolution of the scope of the no-strike agreement—have now refused to arbitrate. As a result of the

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(footnote continued from preceding page)

beyond strikes over arbitrable disputes." *Buffalo Forge*, 428 U.S. at 418-19 (Stevens, J., dissenting), *citing* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. Rev. 663, 757-60 (1973). *See also* Lowden & Flaherty, *supra* note 4, 45 Geo. Wash. L. Rev. at 657 (after *Buffalo Forge*, "employers will be less likely to enter into an arbitration agreement if strikes may not be enjoined despite a no-strike agreement"); Smith, *supra* note 4, 44 U. Chi. L. Rev. at 344 (denying pre-arbitration injunctive relief "undermines the employer's incentive to agree to submit disputes to arbitration in exchange for the union's promise not to strike").

unions' tactics, the scope of the no-strike clause in this case is virtually no closer to being resolved now than it was in August, after the initial "sympathy" strike.

In short, rather than constituting a shield to protect the arbitration process, *Buffalo Forge* operates as a sword to subvert it.

C. *Buffalo Forge* Contravenes the Congressional Policy of Preserving Concurrent State Court Jurisdiction in Enforcing Collective Bargaining Agreements.

Denying specific performance of a union's promise not to strike also undermines the federalism concern, codified in section 301(a) of the LMRA, that state courts continue to exercise concurrent jurisdiction with federal courts in enforcing collective bargaining agreements. As this Court has previously explained, section 4 of the Norris-LaGuardia Act limits only *federal* jurisdiction. It in no way prohibits state courts from enjoining strikes barred by a no-strike clause. *See William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 20 (1974). Thus, in enacting the amendments to the Labor Management Relations Act in 1947, Congress "intended *not* to disturb the pre-existing jurisdiction of the state courts over suits for violations of collective-bargaining agreements." *Boys Markets*, 398 U.S. at 243 (emphasis in original).

Buffalo Forge has effectively dispossessed state courts of their right to enforce collective bargaining agreements by enjoining illegal sympathy strikes. *See* Smith, *supra* note 4, 44 U. Chi. L. Rev. at 343; Lowden & Flaherty, *supra* note 4, 45 Geo. Wash. L. Rev. at 665-66. Unions will invariably invoke federal question jurisdiction to remove disputes that arguably involve sympathy strikes to federal court, thereby gaining the immunity from injunction provided by *Buffalo Forge*.

Indeed, that is precisely what happened here. Morrell initially sued in South Dakota state court, but the unions

removed and ultimately avoided an injunction under *Buffalo Forge*. As the Court explained in *Boys Markets*, this practice "oust[s] state courts of jurisdiction in § 301(a) suits where injunctive relief is sought for breach of a no-strike obligation." 398 U.S. at 244-45. Congress plainly did not intend "the removal mechanism to effect a wholesale dislocation in the allocation of judicial business between the state and federal courts." *Id.* at 247.

Section 301(a), which was enacted to provide additional remedies for breach of collective bargaining agreements, should not be made the vehicle for depriving an employer of its only meaningful way to enforce a union's collective bargaining promise.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue for the purpose of overruling *Buffalo Forge*.

Respectfully submitted,

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Dated: January 26, 1987

APPENDIX

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 86-5364

JOHN MORRELL & COMPANY,
Appellee,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC,
Appellants.

DENNIS FOSTER, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT OF DEFENDANT LOCAL 304A; JAMES R. LYONS, INDIVIDUALLY AND IN HIS CAPACITY AS BUSINESS REPRESENTATIVE AND CORRESPONDING SECRETARY OF DEFENDANT LOCAL 304A; JOHN DOE AND OTHER PERSONS UNKNOWN.

Appeal from the United States District Court for the District of South Dakota.

Submitted: October 17, 1986
Filed: October 30, 1986

Before LAY, Chief Judge, FAGG and BOWMAN *Circuit Judges.*

PER CURIAM.

Local Union 304A of the United Food and Commercial Workers, AFL-CIO (Local 304A) appeals the district court's[1] grant of John Morrell & Company's motion for a preliminary injunction. We reverse.

[1] The Honorable Fred J. Nichol, United States Senior District Judge for the District of South Dakota, presiding.

John Morrell & Co. (Morrell) is a meat processing business with facilities in Sioux Falls, South Dakota and Arkansas City, Kansas (Ark City). Local 304A, an affiliate of the United Food and Commercial Workers International Union, AFL-CIO and CLC, represents employees at the Sioux Falls plant and negotiates collective bargaining agreements with Morrell on behalf of those employees. Local 340, a different local of the same international, represents and negotiates with Morrell on behalf of employees at the Ark City facility. Neither local is a party to the other local's contract with Morrell.

When Local 340's contract with Morrell expired on July 1, 1986, its members struck at the Ark City plant to exert pressure on Morrell to negotiate a new collective bargaining agreement. On two separate occasions, August 4 and August 15, 1986, members of Local 340 also set up picket lines at the Sioux Falls facility. Local 340's business agent testified on cross-examination at the hearing on the preliminary injunction that Local 340's expectation was that if the Sioux Falls employees honored the picket lines, more pressure would be exerted on Morrell to negotiate favorably with the Ark City employees. On both dates, all but one to two percent of the Sioux Falls employees represented by Local 304A refused to cross Local 340's picket lines. While it appears that some officers of Local 304A spoke with Local 340 picketers, no evidence in the record indicates that any member of Local 304A carried picket signs or placards or engaged in any strike activity other than refusing to cross the picket line. The president of Local 304A testified before the district court that his intent as a member of Local 304A in refusing to cross Local 340's picket line was to show support for Local 340 in its contract negotiations with Morrell, and that there was no underlying dispute between Local 304A and Morrell.

Anticipating that Local 304A might take action in support of the Ark City employees, Morrell informed Local 304A by letter on July 30, 1986, that it believed that the no-strike clause[2] in their collective bargaining agreement prohibited Local 304A from honoring a picket line set up in Sioux Falls by Local 340. In that letter, Morrell stated that any Sioux Falls employees who participated in such a strike were subject to termination. On August 4, 1986, the first date Local 304A members refused to cross Local 340's picket line, Morrell sought a temporary restraining order, preliminary injunction, and permanent injunction. That same day, before the issues could be addressed by the district court, Local 340 dismantled its picket line and Local 304A made an unconditional offer to return to work.[3] Although the Sioux Falls employees did return to work on the evening of August 4, Morrell took disciplinary action against the strike participants by noting each employee's absence on August 4 as "unexcused" in its files. In protest of Morrell's action, Local 304A filed a class grievance.

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[2] The no-strike clause reads:

> Provisions having been made by this Agreement and local agreements for the peaceful and orderly settlement of any disputes which may arise between Company and the Union or local Unions or any Employee or Employees, it is agreed that during the term of this Agreement there shall be no strike, stoppage, slowdown, or suspension of work on the part of the union or any local Union or any Union member or lockout on the part of the Company on account of such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the respective agreements.

Article II § 5, Agreement Between John Morrell & Co. and Local 304A and the International Union of the United Food and Commercial Workers, Nov. 20, 1985—Nov. 19, 1988.

[3] Local 304A's unconditional offer to return to work stated: "The picket line is coming down. We're making an unconditional offer to return to work on behalf of the membership of Local 304A, with the regular shifts, starting with tonight."

On August 15, when the members of Local 304A refused to cross a new picket line established by Local 340, Morrell applied for and obtained a temporary restraining order. After an evidentiary hearing on August 18, 1986, at which Local 304A moved the district court to vacate the TRO and deny Morrell further injunctive relief, the district court granted Morrell a preliminary injunction which prohibited Local 304A and all persons acting in concert with its members from participating in work stoppages at the Sioux Falls plant. The district court ordered that the issues raised in the court's memorandum opinion and order be submitted to arbitration. In its memorandum opinion, the district court found that the August 4 strike was a sympathy strike which could not properly be enjoined. However, relying on the fact that the second work stoppage occurred after the union had submitted an unconditional offer to return and had filed the class grievance, it concluded that the August 15 action was only in the guise of a sympathy strike and had been transformed into a dispute over underlying arbitrable issues. Because it had concluded that the second strike was over an arbitrable grievance covered by the terms of the parties' collective bargaining agreement, the district court determined that the second strike could be enjoined. After unsuccessfully seeking a stay from the district court pending appeal, Local 304A petitioned this court for an expedited hearing, which we granted.

To determine whether the district court properly enjoined Local 304A's strike activities, we start with the congressional limitation on a federal court's jurisdiction to issue orders enjoining a strike, set our in section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104.[4] A narrow ex-

[4] Section 4 of the Norris-LaGuardia Act provides, in pertinent part:

No court of the United States shall have jurisdiction to issue

Footnote continued on following page.

ception to this statutory prohibition from enjoining strikes was established by the Supreme Court in *Boys Markets, Inc. v. Retail Clerk's Union*, 398 U.S. 235 (1970), which allows an injunction to issue only if the strike is over a dispute which under the parties' collective bargaining agreement should be submitted to arbitration. In two subsequent cases, the Supreme Court emphasized the narrowness of the *Boys Markets* exception and held that a *Boys Markets* injunction may not issue unless the strike has been triggered by an arbitrable dispute. *See Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n.*, 457 U.S. 702 (1982), and *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976) (both cited in *Purex Corp. v. Automotive, etc. Employees Union*, 705 F.2d 274, 276 (8th Cir. 1983)).

In gauging the intended scope of the *Boys Markets* exception to the anti-injunction rule, this court has observed that

> [t]he Supreme Court's opinions in *Buffalo Forge* and *Jacksonville Bulk Terminals* analyze the *Boys Markets* exception as a means for effectuating the national policy favoring agreements to arbitrate, and not as an enforcement mechanism for no-strike clauses. Both *Buffalo Forge* and *Jacksonville Bulk Terminals* distinguish between strikes where the underlying dispute is arbitrable and those where the legality of the strike itself is arbitrable. Only in the former category are strikes subject to injunction, because

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> any restraining order or temporary or permanent injuction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute * * * from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104.

only there does the strike represent a breach of the Union's agreement to arbitrate.

Purex Corp., 705 F.2d at 276; *see also Peabody Coal Co. v. International Union, UMWA*, 430 F. Supp. 205, 207 (E.D. Mo. 1977). Moreover, even in *Boys Markets*, the Supreme Court cautioned that its views should not be construed to find "that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance." *Boys Markets*, 398 U.S. at 253-54.

Applied to the facts of this case, the anti-injuction principles just outlined require that the district court find that Local 304A's strike activity represented a union response to a dispute over a grievance which the union was contractually bound to arbitrate. *See National Rejectors Indus. v. United Steelworkers*, 562 F.2d 1069, 1075 (8th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978), (citing *Buffalo Forge*, 428 U.S. at 409). In the findings of fact contained in its order granting a preliminary injuction, the district court found that "[t]he [August 4, 1986] picket line was honored to show support for Local 340 workers" and that on August 15, 1986 "the workers again refused to cross a second picket line established at the Sioux Falls plant by Local 340." These findings, which are supported by the record, identify the underlying cause of strike activity on both dates to be Local 304A's response to the appearance of Local 340 pickets, motivated by a desire to show support for the Ark City employees in Local 340's contract negotiations with Morrell. To the extent that the district court found that the first strike was a sympathy strike, that the parties' no-strike clause did not prohibit sympathy strikes, and that the August 4 strike could not be enjoined by a federal court, we agree with the district court's analysis. However, although the district court made no finding of fact that either strike at the Sioux Falls plant

was motivated by a labor dispute between Local 304A and Morrell, and did not find that members of Local 304A struck at any time other than the two separate dates that Local 340 pickets appeared in Sioux Falls, the district court concluded as a matter of law that Local 304A's refusal on August 15 to cross Local 340's picket line was precipitated by the grievance filed by Local 304A to protest Morrell's discipline of employees who participated in the August 4 strike. The district court concluded that the second strike therefore fell within the *Boys Markets* exception and could be enjoined. For this conclusion, we can find no support in the record, in the district court's findings of fact, or in the applicable case law.

No evidence indicates that Local 304A was attempting to circumvent its contracted-for obligation to process this dispute through normal arbitration channels by striking. To the contrary, the record shows that Local 304A has sought, not avoided, arbitration of the grievance. Moreover, arbitration of the grievance will not resolve what the district court itself found to underlie Local 304A's strike actions—the desire to show support for Local 340. The evidence does indicate that a work stoppage occurred at the Sioux Falls plant on August 15 only when Local 340 pickets reappeared. The chronology of events on which the district court relied cannot alone support an inference that the August 15 strike was over Morrell's disciplinary acts, especially when the evidence at the hearing uniformly supports a conclusion that the August 15 strike, like the August 4 strike, was solely a sympathy strike in support of Local 340. Nothing in the record or in the district court's findings supports an inference of a cause and effect relationship between the grievance and the August 15 strike.

Further, the district court's reliance on *Complete Auto Transit, Inc. v. Reis*, 614 F.2d 1110 (6th Cir. 1980), *aff'd on diff. grounds*, 451 U.S. 401 (1981), to conclude that the August 15 work stoppage was transformed into a strike over an arbitrable grievance is misplaced. In *Complete Auto*, the evidence in the record indicated that although the original non-arbitrable event causing the strike was resolved, the strike continued over an admittedly arbitrable dispute. *Id.* at 1111. The Sixth Circuit held that in determining the cause of a strike for purposes of issuing an injunction, a district court should consider what the strike was "over" at the time of its decision rather than what "precipitated" the strike in the first place. *Id.* at 1114.

Here, the event causing the August 4 sympathy strike, Local 340's stalled contract negotiations with Morrell, remained unresolved as of August 15. The fact that Local 304A filed a grievance indicates that Local 304A was consciously invoking arbitration machinery to resolve the dispute. The Sixth Circuit's reasoning in *Complete Auto* does not teach that whenever a grievance is pending which arose out of a strike that could not be enjoined, a union cannot subsequently engage in another protected strike. We know of no court which has relied on *Complete Auto's* "transformation" analysis to find an injunction of a strike warranted. Nor does any case of which this court is aware, including *Complete Auto*, hold that because a grievance is pending a subsequent strike is presumptively undertaken in response to the dispute underlying that grievance. Moreover, the Sixth Circuit itself has apparently questioned the continuing vitality of *Complete Auto's* transformation theory. Although *Complete Auto* was affirmed on other grounds on appeal, in a subsequent case discussing the prerequisites to issuance of an injunction pending arbitration, that court noted that "the

Supreme Court has not addressed the validity of the transformation analysis." *International Union United Automobile, etc. Workers v. Lester Eng'g Co.*, 718 F.2d 818, 824 n.1 (6th Cir. 1983) (citing *Jacksonville Bulk Terminals*, 457 U.S. at 723 n.22)). *Complete Auto* lends no support to the district court's conclusion that the August 15 strike was not a sympathy strike to the same extent as was the strike on August 4.[5]

The uncontradicted evidence in the record indicates that although Local 304A's filed grievance resulted from Morrell's retaliation for Local 304A's participating in the

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[5] In concluding that the August 15 work stoppage was in the "guise" of a sympathy strike, the district court emphasized that Local 304A had made an unconditional offer to return to work which the district court "accepted." Citing no authority for its conclusions, the district court interpreted the "offer" as becoming part of the collective bargaining agreement, presumably concluding that in making the offer Local 304A waived its right to engage in any future strike of any kind. We believe that this interpretation of the events of August, 1986 overlooks the function of unconditional offers in labor relations as a means to conclude a strike and reinstate strikers to their original jobs without the union members being displaced by replacement workers. *See, e.g., NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380-81 (1967); *C.H. Guenther & Son, Inc. v. NLRB*, 427 F.2d 983, 985 (5th Cir.), *cert. denied*, 400 U.S. 942 (1970). *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 103 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). The right of employees to engage in sympathy strikes in support of another union is protected under provisions of the National Labor Relations Act, *see* 29 U.S.C. §§ 157, 163, although employees may waive this right if the waiver is clear and unmistakable. *Amcar Division, ACF Indus. Inc. v. NLRB*, 641 F.2d 561, 566 (8th Cir. 1981). However, we do not believe that it is proper to construe this unconditional offer to return to work as a new promise, incorporated in the collective bargaining agreement, in which Local 304A waived its right to engage in further lawful strike activity.

August 4 strike, the grievance did not precipitate Local 304A's participation in the August 15 strike. Neither the record nor the district court's own findings support the district court's conclusion that the August 15 strike was not a sympathy strike but had been transformed by virtue of the filed grievance into a strike over an arbitrable matter. Because there is no evidence in the record to support the district court's finding that the August 15 strike was over an arbitrable grievance, the strike does not fall within the narrow *Boys Markets* exception to the anti-injunction rule. Under section 4 of the Norris-LaGuardia Act, the district court was without jurisdiction to issue a preliminary injunction.[6]

The decision of the district court is reversed,[7] and the district court is directed to vacate its order granting the preliminary injunction.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[To be published.]

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[6] Although Morrell argues that our decision in *Campbell "66" Express, Inc. v. Rundel*, 597 F.2d 125 (8th Cir. 1979), is controlling here, we do not believe that case supports a different result. In *Campbell*, the district court found that the facts in the record demonstrated that the union had attempted to circumvent the result of a binding grievance proceeding by picketing the company. The district court made findings, supported by the record, that the purpose of the picketing was not primarily informational, as the union claimed, but was designed to get an employee rehired whose termination had been upheld by an arbitrator. Here, neither the record evidence nor the district court's findings support a conclusion that Local 304A's stated reasons for striking were pretextual.

[7] Morrell has also filed a complaint seeking money damages for harm allegedly incurred through Local 304A's activities. The merits of Morrell's request for damages has never been addressed, and we do not decide those issues here.

Filed August 29, 1986
William F. Clayton, Clerk

UNITED STATES DISTRICT COURT
District of South Dakota
Southern Division

JOHN MORRELL & CO.,
Plaintiff,

vs.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO AND CLC; and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC; DENNIS FOSTER, Individually and in his capacity as president of Defendant Local 304A; JAMES R. LYONS, Individually and in his capacity as Business Representative and Corresponding Secretary of Defendant Local 304A; and JOHN DOE AND OTHER PERSONS UNKNOWN,
Defendants.

CIV86-4135

Memorandum Opinion and Order

The plaintiff, John Morrell & Co. (Morrell), is a corporation engaged in the meat processing business, an industry affecting commerce within the meaning of the Labor-Management Relations Act section 301(a), 29 U.S.C. section 185(a), and the National Labor Relations Act (NLRA) section 2, as amended, 29 U.S.C. section 152. The defendants, Local 304A of the United Food and Commercial Workers Union (UFCW), AFL-CIO (Local 304A), and UFCW International Union, AFL-CIO (International), are unincorporated associations and labor organizations within the meaning of the NLRA Section

2(5), 29 U.S.C. section 152(5). Morrell and Local 304A and the International are parties to a collective bargaining agreement with a term from November 20, 1985, through November 19, 1988. The plaintiff brought this action pursuant to section 301 of the Labor-Management Relations Act, 29 U.S.C. section 185, seeking preliminary injunctive relief against further work stoppages by the defendants in violation of this collective bargaining agreement. For the reasons hereinafter stated, the plaintiff's motion for a preliminary injunction is granted conditioned upon the employer submitting both grievances to arbitration. *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 254 (1970).

FACTS

The collective bargaining agreement between Morrell and Local 304A and the International contains the following no-strike clause:

> 5. Provisions having been made by this Agreement and local agreements for the peaceful and orderly settlement of any disputes which may arise between Company and the Union or local Unions or any Employee or Employees, it is agreed that during the term of this Agreement there shall be no strike, stoppage, slowdown, or suspension of work on the part of the union or any local Union or any Union member or lockout on the part of the Company on account of such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the respective agreements.

Mandatory grievance and arbitration provisions are also contained in the agreement and are all specifically referred to in this no-strike clause ("the manner provided in the respective agreements").

Morrell's also has a meat processing facility located in Arkansas City, Kansas (Ark City). This facility's

bargaining representative with Morrell is Local 340 of the UFCW, along with International. Any collective bargaining agreement between Morrell and the Ark City facility is separate and distinct from that between Morrell and Local 304A in Sioux Falls. The labor contract at the Ark City plant expired July 1, 1986, and when negotiations were unsuccessful between Local 340 and Morrell, Local 340 went out on strike. The legality of this strike is not at issue here.

On August 4, 1986, a number of the members of Local 340 set up a picket line in front of the Sioux Falls Morrell plant. With insignificant exception, Local 304A and the employees at the Sioux Falls plant whom Local 304A represent honored this picket line. At this time, Local 304A, as testified to by its president Dennis Foster, had no grievance with the plaintiff. The picket line was honored to show support for Local 340 workers.

Morrell immediately sought a temporary restraining order and injunctive relief to end this work stoppage. Before any court addressed this issue, however, Local 304A, by and through its business representative Jim Lyons, made an unconditional offer to return to work.

On August 8, 1986, Local 304A filed a grievance pursuant to the collective bargaining agreement, claiming a violation of Article II, Section 5, the no-strike provision, of the agreement. The union claimed that the contractual agreement permitted Local 304A members to honor picket lines without being subject to discipline or discharge. This grievance was filed in response to action taken by Morrell against employees who had refused to cross the picket line; the employees' personnel records were noted with an unexcused absence from work on that date.

Despite the unconditional offer to return to work and with the grievance pending, the workers again refused to

cross a second picket line established at the Sioux Falls plant by Local 340 on August 15, 1986. When this second work stoppage occurred, Morrell sought and obtained a Temporary Restraining Order (TRO), issued August 15, 1986, restraining the members of Local 304A from further work stoppages. Local 304A, by and through its president Dennis Foster, again, on August 15, 1986, made an unconditional offer to return to work.

ISSUE

The issue presented to the court was whether injunctive relief could be granted pending arbitration of the dispute between Morrell and Local 304A and the International under *Boys Markets, Inc. v. Retail Clerk's Local 770*, 398 U.S. 235 (1970).

In *Boys Markets*, the Supreme Court determined that an exception to the general anti-injunction rule of the Norris-LaGuardia Act, 29 U.S.C. section 104, is that an injunction could be granted where an employer sought to enforce the union's contractual obligation to arbitrate grievances rather than strike over them. *Boys Markets*, 398 U.S. at 249-253. This narrow exception was further clarified in *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976). In *Buffalo Forge*, the Court held that the *Boys Markets* exception does not apply when "*only* the question whether the strike violates the no-strike pledge, and not the dispute that precipitated the strike, is arbitrable under the parties collective bargaining agreement" *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n.*, 457 U.S. 702, 708-709 (1982).

Buffalo Forge at first blush would appear to be dispositive of the issue before this Court. The factual situ-

ation addressed in *Buffalo Forge* was a pure sympathy strike, wherein members of one union with no dispute with their employer, honored the picket line of a separate bargaining unit who in fact had a dispute with the same employer. *Buffalo Forge*, 398 U.S. at 399-404. Since there was in fact no dispute between the union honoring the picket line and the employer, the sympathy strike was not *over* an arbitrable grievance and thus not subject to the *Boys Markets* exception. *Id.* at 404. The Court did not disagree that the issue of whether the sympathy strike violated the no-strike provision of the collective bargaining agreement was itself arbitrable. *Id.* at 405, 410. However, since there was *no underlying dispute* between the union and employer, no injunctive relief pending arbitration was justified, thus *Boys Markets* did not control the case. *Id.* at 407.

This reasoning of *Buffalo Forge* was reaffirmed in the subsequent case of *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n.*, 457 U.S. 702 (1982). The dispute at issue in *Jacksonville* was whether the refusal by the union, in protest of the Soviet invasion of Afghanistan, to handle cargo bound to or coming from the Soviet Union violated the collective bargaining agreement between the parties. The employer sought injunctive relief pending arbitration of this dispute.

Both *Buffalo Forge* and *Jacksonville* addressed a work stoppage that occurred, not in response to any specific dispute between the union and the employer, but rather, was in response to some other distinct controversy, *i.e.*, another union's strike and the Soviet invasion of Afghanistan. This is similar to what occurred on August 4, 1986, in the case at bar. Local 304A, at that time, had no separate arbitrable dispute with the plaintiff. Local 304A simply honored the picket line established by Local 340 and thus squarely came within the *Buffalo Forge* rationale. Injunctive relief at that point would have been improper.

However, the union *unconditionally* agreed to return to work before the Court could even address the question of injunctive relief. This *unconditional offer* was accepted by the company and became a part of the ongoing collective bargaining agreement. Local 304A, four days later, filed a grievance against Morrell charging that the employer's action in disciplining employees who failed to work on the day of the sympathy strike violated the no-strike provision of the collective bargaining agreement. The union, by filing this grievance, has recognized the arbitrability of this dispute between itself and the plaintiff. Yet one week later, on August 15, Local 304A again participated in a work stoppage under the guise of a "sympathy strike" for Local 340.

It is this subsequent work stoppage, after an unconditional offer to return to work following a grievance submitted by the Union, that distinguishes this case from both *Buffalo Forge* and *Jacksonville*. The original work stoppage, which began as a sympathy strike over a nonarbitrable dispute, has now been transformed into a dispute over an arbitrable issue, *i.e.*, the right under the collective bargaining agreement to discipline these workers. The Sixth Circuit has in fact addressed this "transformation" concept in *Complete Auto Transit, Inc. v. Reis*, 614 F.2d 1110 (6th Cir. 1980), *aff'd on other grounds*, 451 U.S. 401 (1981). The Supreme Court, however, has not addressed the validity of this transformation analysis. *Jacksonville Bulk Terminals*, 457 U.S. at 723 n.22, citing *Complete Auto Transit*, 451 U.S. at 401 n.4.

In *Complete Auto* there was a work stoppage based upon an intra-union dispute. This stoppage was not enjoinable under *Buffalo Forge* because there was no underlying arbitrable dispute between the employer and union. After the intra-union dispute was settled, the

work stoppage continued when a question arose over the amnesty the workers were to be given by the employer. This question of discipline was a dispute between the employer and union and was over the terms of employment and thus arbitrable under the collective bargaining agreement. The Sixth Circuit noted that the focus in determining the propriety of injunctive relief should be on what the strike was *over* at the *time* of the *decision*, not what *precipitated* it in the first place. *Complete Auto*, 614 F.2d at 1110, 1114. This Court agrees.

The situation at bar, as supported by evidence, is such that the second work stoppage occurred after a grievance had been filed concerning the discipline of workers and after an unconditional offer to return to work has been accepted by the employer. Any subsequent stoppage, even if under the guise of sympathy strike, was transformed into a dispute over these underlying arbitrable issues and is enjoinable under the *Boys Markets* exception.[1] And further, resolution of the discipline grievance pending before the arbitrator will in fact resolve both the issue of the validity of a sympathy strike under the terms of the collective bargaining agreement as well as the discipline issue.

In addition to finding that an underlying dispute is arbitrable under the terms of the collective bargaining agreement, the court must also consider whether the ordinary principles of equity warrant the issuance of injunctive relief. *Boys Markets*, 398 U.S. at 254. In order to determine the equity of such relief, the court must

[1] This Court is not unmindful of the Eighth Circuit decision of *Valmac Industries, Inc. v. Food Handlers Local 425*, 519 F.2d 263 (8th Cir. 1975), *cert. granted, vacated and remanded*, 428 U.S. 906 (1976), but feels that the facts in the case at bar are distinguishable from *Valmac* and are much more in line with *Complete Auto*, and accordingly holds with the Sixth Circuit.

consider: (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict; (3) the probability of the movant's success on the merits; and (4) the public interest. *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc).

Testimony was presented to the court as to both the competitive nature of the meat processing industry and the fungible nature of the industry's product. When orders are unable to be filled, customers in a competitive market are forced to go elsewhere. Often this can result in a permanent loss of this customer, especially when the inability to fill orders is repetitive and sporadic. Suppliers are also affected when the company is unable to accept delivery and keep its commitment as to the number of animals needed. All of these, customer loss, perishable nature of the product, and loss of suppliers, risks irreparable harm to the goodwill of the company. *See, Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 592 (8th Cir. 1983).

The balance of harm in the case at bar falls on the side of Morrell. As noted above, the potential loss of goodwill, customers, suppliers, etc., is great. Local 304A and the International have not demonstrated what harm, if any, would result to the union if an injunction, conditioned on submission of the issues to arbitration, is granted. Such an injunction may, in effect, protect the job security of the defendant union members.

There is a broad no-strike provision contained in the current collective bargaining agreement between the parties. There was also evidence as to certain provisions that Local 304A and the International submitted during the negotiations of the present agreement. These proposed provisions specifically allowed the members of Local 304A to honor picket lines established at the Morrell

facility without discipline or discharge. This provision was *not* incorporated into the collective bargaining agreement signed by both parties. Such evidence supports the probability of success on the merits for Morrell on both the issue of discipline and the legality of a sympathy strike.

Lastly, the Court in *Boys Markets* found in favor of allowing injunctive relief when the underlying dispute was present in order to further the congressional policy of favoring peaceful resolution of labor disputes. *Boys Markets*, 398 U.S. at 253. Undoubtedly peaceful resolution of the dispute in question is in the public interest.

Having found that, at the time of this decision, there is in fact an arbitrable dispute between Local 304A and Morrell which precipitated a second work stoppage on August 15, 1986, even though under the guise of another sympathy strike, and finding that the principles of equity favor the granting of injunctive relief,

THEREFORE, IT IS ORDERED:

That the plaintiff's motion for a preliminary injunction is granted, conditioned upon the employer (Morrell) submitting to arbitration. This Memorandum Opinion constitutes the Court's Findings of Fact and Conclusions of Law pursuant to F.R.C.P. 52(a).

Dated this 29th day of August, 1986.

BY THE COURT

/S/ FRED J. NICHOL
Fred J. Nichol
Senior District Judge

ATTEST:

WILLIAM F. CLAYTON,
Clerk
By /S/ KAREN M. TOFT
Deputy

NOTICE OF ENTRY

Take notice that the original of this copy was filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 29th day of August, 1986.

/S/ WILLIAM F. CLAYTON, *Clerk*

Filed September 5, 1986
William F. Clayton, Clerk

UNITED STATES DISTRICT COURT

District of South Dakota

Southern Division

JOHN MORRELL & CO.,

Plaintiff,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO AND CLC; and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC; DENNIS FOSTER, Individually and in his capacity as president of Defendant Local 304A; JAMES R. LYONS, Individually and in his capacity as Business Representative and Corresponding Secretary of Defendant Local 304A; and JOHN DOE AND OTHER PERSONS UNKNOWN,

Defendants.

CIV 86-4135

Preliminary Injunction

PRELIMINARY INJUNCTION

This cause coming to be heard on plaintiff's motion for preliminary injunction and the Court having held an evidentiary hearing and issued a Memorandum Opinion and Order dated August 29, 1986, containing findings of fact and conclusions of law which are incorporated herein by reference:

IT IS HEREBY ORDERED that defendants, their officers, agents, servants, representatives, members and employees and all those in active consort or participation with them, and each of them, are enjoined and must refrain from calling, instigating, directing, encouraging, causing, assisting or participating in a strike, work stoppage, slowdown, picketing or interruption with the operation of plaintiff's Sioux Falls plant in violation of the current Collective Bargaining Agreement in effect between the parties or Defendant Unions' unconditional offer to return to work.

IT IS FURTHER ORDERED that the parties shall submit the issues raised in the Court's Memorandum Opinion and Order of August 29, 1986 to arbitration.

IT IS FURTHER ORDERED that this Preliminary Injunction shall remain in effect until a trial on the merits of this action or until further Order of the Court.

IT IS FURTHER ORDERED that this Order be served by any person who is at least eighteen years of age and not a party to this action selected for that purpose by the plaintiff. Service of a copy of this Order upon any attorney appearing in this matter on behalf of any defendant or defendants shall be deemed to be served upon such defendant or defendants.

Dated: September 5th, 9:00 o'clock A.M., 1986.

/S/ FRED J. NICHOL
United States District Judge

September 5th, '86